No. 9019

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit 4

LYON COUNTY BANK MORTGAGE CORPORATION (a corporation), *Appellant,* vs. W. J. TOBIN, as Receiver of The Reno National Bank, of Reno, Nevada (a National Banking Association), *Appellee.*	

APPELLANT'S REPLY BRIEF.

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vs.

W. J. TOBIN, as Receiver of The Reno National Bank, of Reno, Nevada (a National Banking Association),
Appellee.

APPELLANT'S REPLY BRIEF.

Appellee states: "The question involved in this suit is whether interest can be paid on the note which the appellee holds after the date of insolvency of the Lyon County Bank".

But should this court answer that question in the affirmative there will remain the further question as to the manner in which such interest ought to be paid.

Appellee says appellant concedes the accuracy of his statement and cites the statement of the question on page 14 of appellant's brief.

Appellant did not make that statement as the "only" question of law in this case, but as the one major question of law:

> "There is one major question of law in the case and one major question of fact."
>
> Appellant's Brief, page 3.

Appellant does not waive the assignments of error contained in the transcript, pages 63 to 68 inclusive and relied on, pages 13 and 14 of appellant's brief.

Appellee does not dispute the other questions of law or the questions of fact. Therefore he agrees with appellant as to them.

Appellee takes the appellant's statement of the major question of law and divides it into three parts, as follows:

> "The question of law is (1) whether under the Nevada statute interest on a claim against an insolvent bank, computed over any period after insolvency can be charged or collected, and (2) whether the rule requiring a ratable distribution to creditors permits any claim to be increased by interest after insolvency, or (3) permits a secured creditor to retain any interest collected from collaterals, other than the interest accrued and collected from collaterals after insolvency, applying all other collections from the collaterals to the reduction of the claim for principal alone, without interest."

Appellee admitted on the trial and admits in the brief, by failing to deny the proposition advanced on page 32 of appellant's brief, that the Nevada banking law is exclusive, but he contends that the Nevada law is not applicable to the facts here presented. He contends that interest may be added to the face of this alleged "secured" obligation, after insolvency without doing violence to the principle of ratable distribution but he admits that when a secured creditor looks to his collaterals, he may apply toward interest on the obligation after insolvency, only the interest that he has collected from his collaterals after insolvency and he must credit all other collections on the face of the obligation.

Appellee therefore is in agreement with appellant as to the manner of applying interest from the collaterals, if any interest is to be computed on the obligation from date of insolvency at all.

Appellee argues the three parts of the question in their inverse order but we prefer to retain the order of our opening brief. It is the logical order beginning with the Nevada law, following with the Nevada contract and closing with such decisions as may be applicable.

This suit is not affected by the National Bankruptcy Act or the National Bank Act or the Federal Reserve Act. The debtor stands in the shoes of an insolvent state bank. The receiver represents an insolvent national bank, but he might well be an individual.

I. WHETHER UNDER THE NEVADA STATUTE INTEREST ON A CLAIM AGAINST AN INSOLVENT BANK COMPUTED OVER ANY PERIOD AFTER INSOLVENCY, CAN BE CHARGED OR COLLECTED.

Strictly speaking this is not a "claim" in insolvency proceedings. The creditor did file a claim but did not ask or receive stock in the mortgage corporation in lieu of his rights and on which he would be entitled to receive dividends in payment. He looked to his security. We contend he has no lien or charge for any interest incurred after the known fact and day of taking over in insolvency, February 16, 1932. (Sec. 53, Nevada Banking Act of 1911; N. C. L. 1929, Sec. 702.) Preference was forbidden. (Sec. 35, same act; N. L. C. 1929, Sec. 684.) The pledge of July 22, 1931, was for a pre-existing debt and a badge of fraud for both principal and interest, if considered "incurred" July 1, 1931. The interest is considered incurred after insolvency and a lien or charge for payment is forbidden by Sec. 53 of the Nevada act.

Appellee at page 22 et seq. questions our interpretation of the word "incurred" as used in Sec. 53 of the Bank Act of 1911, N. C. L. 1929, Sec. 702. See appellant's brief pages 23, 27, 28, 29, 41, 45. Appellee states we have cited no authority. We call attention to the authorities cited on pages 41, 43 and 44 of appellant's brief which appellee has ignored.

Even taking the definition in "Words & Phrases" and in 22 Cyc. 73, quoted by appellee on page 22, it appears that one incurs a liability or a payment when the time comes to discharge it. This cannot arise until it can be fixed in a definite sum. The interest in question is that incurred after February 16, 1932. The theory of the act is well illustrated in appellant's brief, page 49:

> "if interest has been prepaid by the insolvent corporation for any period subsequent to such appointment, such prepaid interest will be deducted from the amount of the claim as proved."
>
> *City of Louisville v. Fidelity & Columbia Trust Company,* 54 S. W. (2d) 40.

Appellee cites "Words & Phrases" but we find in that work Vol. 2 (second series), page 1025, a quotation from *Bank of Indian Terr. v. Eccles,* 91 P. 695-697:

> "It has been suggested in the argument that this inhibition relates only to contractual obligations and does not affect imposed obligations or liabilities; that the salary of the sheriff was fixed by the laws of Oklahoma, and the law required him to be paid certain fees by the county; and that it was not the intention of Congress to take from the counties the authority to pay this class of obligations. The language used by Congress will not admit of this contention. The law says 'contracted or incurred'. The word 'contracted' includes all of one class, and the word 'incurred', to be given any meaning whatever, must be held to include another class. There are only two classes of county obligations, contractual and imposed, and evidently Congress meant to include both classes. The word 'incurred' is defined by Webster as 'to become liable or subject to; to render liable or subject to'. Black says: 'Men contract debts. The incur liabilities. In the one case, they act affirmatively; in the other, the liability is incurred or cast upon them by operation of law. "Incur" means something beyond contracts, something not embraced in the word "debt"'. In Scott v. Tyler, 14 Barb. (N. Y.) 202, 'incur' is held to mean 'to become liable for'. Flanagan v. Baltimore & O. R. Co., 83 Iowa, 639, 50 N. W. 60: 'To become liable for'. In Beekman v. Van Dolsen, 24 N. Y. Supp. 414, 70 Hun. 288: 'To become liable for'. In Deyo v. Stewart, 4 Denio (N. Y.) 101: 'Brought on himself'. In Ashe v. Young, 68 Tex. 123, 3 S. W.

> 454: 'Brought on, occasioned, or caused'. Hence it is apparent that the word 'incurred' means more and embraces a different class of liabilities or obligations from these contracted. It means the indebtedness imposed upon the county by salaries of county officers and other required and necessary expenses, all of which, to be a charge against the lot sale fund, must be authorized or approved by the Secretary of the Interior. * * *"

Counsel for appellee quotes from *Beemer v. Packard,* 38 N. Y. S. 1045-1046.

The quotation is a summary of the case of *Agawam Bank v. Streever,* 18 N. Y. S. 502-510.

These cases are not in point. The question there was whether parol evidence could be admitted to show the intention of the parties in using the word "incurred" in the written contract or pledge. The court held that while, grammatically, the word would look to the past, the case was such that oral evidence to bring out or vary the meaning was permissible.

That was a private obligation governed by a private contract. Of course no opportunity exists in the instant case to test by oral evidence the meaning of the legislative enactment.

The meaning of the word "incur" is considered in Vol. 31 Corpus Juris, page 410 (from whence counsel apparently obtained the citation to *Beemer v. Packard.*)

> "The mere giving of a note as evidence, and security for the payment, of a debt, is not the

creation, making or incurring of a debt within the meaning of this constitutional provision."

J. B. McCrary Co. v. Town of Brantley, 79 So. 602-604 (Ala.).

Under the Internal Revenue Act deductible expenses "incurred" or "accrued" are the subject of judicial decisions:

Bauer v. Commissioner of Int. Rev., 46 F. (2d) 874 (C. C. A. 6th);

Desco Corp. v. U. S., 55 F. (2d) 411.

These cases hold generally that "expenses" are not "incurred" during the taxable year unless the legal obligation to pay them has arisen.

We add another authority on the question of the word "incurred":

Dealtry v. Selectmen of Town of Watertown (Mass. 1932), 180 N. E. 621 (cited in Words & Phrases (Fourth Series), p. 320 et seq.)

The court denied that the selectmen incurred an excess liability by letting a contract for paving that might some day involve an expensive suit for infringement of a patent on paving materials.

On pages 22-25 of his brief counsel discusses at some length the distinction which might be made between the words "incur" and "accrue", but we feel that in so doing he is treading on very dangerous ground, in view of the language of the contracts and of Sec. 53 of our Banking Act. Counsel does not go so far as to say that interest which might or which might not accrue at some indefinite time in the future on the $60,500.00 note of July 1, 1931, could be considered in ascertaining the "present indebtedness" of the Lyon County Bank to The Reno National Bank on July 22, 1931. In our opening brief (pp. 41-45) we submitted at some length our views upon the question as to the meaning of this term "present indebtedness", and counsel has not seen fit to question our statements nor to cite any authority contrary to the cases referred to by us.

We believe that no court ever has held nor ever will hold that the expression "present indebtedness" will embrace future interest which may or may not accrue. It also seems to us that this is the crux of the receiver's entire case, for the reason that, if counsel is correct in his contention that future interest is not a "liability thereafter incurred", then under the express terms of the collateral agreements the assets were pledged merely and solely for the payment of the "present indebtedness" of the Lyon County Bank to The Reno National Bank as of July 22, 1931—and, if future interest is neither a "liability thereafter incurred" nor a "present indebtedness", then the receiver is most certainly barred by the contracts from asserting any claim whatsoever for interest.

At the bottom of page 22 of his brief, to support the logic of his argument with reference to the meaning of the word "incur" and of the expression "present indebtedness", counsel states that our argument would lead to the following conclusion:

> "If a man borrowed $10,000 on a note payable $1000 annually, and the maker of the note became insolvent at any time before full payment, the

> payee of the note could not collect for the installments accruing after insolvency, as the maker would contend that the remainder of the note was incurred thereafter. The reasonable construction would be that the indebtedness was incurred at the time of the signing of the note and would apply to any new indebtedness, but not to indebtedness accruing thereafter."

We do not understand the latter part of the last sentence of counsel's statement, but the paragraph as a whole clearly illustrates the fallacy of counsel's argument, for if a man gave a note for $10,000.00 that would certainly represent his "present indebtedness" as of the date of the note, although the annual installments would naturally become payable thereafter. This man's "present indebtedness" could be ascertained at any time by computing the actual balance then unpaid upon the note with interest already earned.

We have not at any time conceded, as stated by counsel on page 2 of his brief, that the "only" question of law involved in this case is whether or not interest can be paid on the note which the appellee holds after the insolvency of the Lyon County Bank. In our opening brief (page 3) we referred to this as the one major question of law, but naturally we do not waive the assignments of error contained in the transcript, pages 63-68, and in our opening brief, pages 13-14. Appellee does not dispute these other questions of law nor the facts upon which they are based, and we must therefore conclude that he concurs with our position in respect thereto.

This suit is neither governed nor affected by the National Bankruptcy Act or the National Bank Act or the Federal Reserve Act. The mortgage corporation stands in the shoes of an insolvent state bank. The receiver represents an insolvent national bank, but he might as well be an individual so far as the applicable law is concerned.

Preferences are forbidden by Sec. 35 of our Banking Act. The pledge of July 22, 1931, was for a pre-existing debt and was a badge of fraud. In *Dellamonica v. Lyon County Bank Mortgage Corporation,* 78 Pac. (2d) 89, the Supreme Court affirmed a finding that the Lyon County Bank was insolvent on September 10, 1931. It was undoubtedly insolvent or at least in a failing condition on July 22, 1931.

In the case of *Schramm v. Bank of Calif. N. A.*, 20 Pac. (2d) 1093, at page 1095, it is pointed out as admitted that the statute of Oregon (Sec. 22-802 Oregon Code 1930):

> "renders void a pledge made to secure a pre-existing debt, whether the indebtedness be due to a depositor or to any other creditor."

That statute is similar to Sec. 35 of the Nevada Act of 1911, except that the Nevada act is stronger by denouncing a preference by pledging "or otherwise".

Appellee cites, at page 21 of his brief, *Organ v. Winnemucca State Bank & Trust Co.* (Nov. 3, 1933), 26 Pac. (2d) 237. In our opening brief, at page 27, we cited the case of *Dellamonica v. Lyon County Bank*

Mortgage Corporation (April 5, 1938), supra. That later Nevada decision construed the same statute, and the court said:

> "Neither the case of Organ v. Winnemucca State Bank, 55 Nev. 72, 26 P. (2d) 237, or Lothrop v. Seaborn, 55 Nev. 16, 23 P. (2d) 1109, is controlling or analogous in the instant case."

Appellee has not commented on this decision.

On page 24 of his brief, with reference to Sec. 53 of our Banking Act, counsel states:

> "I have been unable to find much authority on this subject. My idea would be that no one has ever heretofore placed the construction on the statute that counsel try to place on it."

It would seem to us, however, that all of the available cases squarely sustain our contentions, even in the absence of a controlling statute. Our Sec. 53 enacted into statutory law the principle that interest cannot be allowed after the insolvency of the pledging bank. In fact, this very court, in *Douglass v. Thurston County,* 86 F. (2d) 899 (910), called attention to the scarcity of any rule or law which would support the contention of the present appellee, when it said:

> "In support of his contention in favor of the allowance of interest after the bank's insolvency, the treasurer relies upon a single decision—that of Washington-Alaska Bank v. Dexter Horton Nat. Bank (C. C. A. 9), 263 F. 304, 306, 307."

In the *Washington-Alaska* case the court found that the contract and security contemplated the continued payment of interest and rejected the contention that the Nevada Bank Act of 1909 had extraterritorial effect and governed the contract, but the *Douglass v. Thurston County* decision would seem to virtually overrule the court's previous holding in the *Washington-Alaska* case or at least to declare the latter as a sort of case apart. In any event emphasis was placed upon the fact that the *Washington-Alaska* case was the only one cited which could tend to support the treasurer's position, which was the same as that of the present appellee.

II. WHETHER THE RULE REQUIRING A RATABLE DISTRIBUTION TO CREDITORS PERMITS ANY CLAIM TO BE INCREASED AFTER INSOLVENCY.

In the case of the liquidation of an insolvent bank by this rule in most states creditors are entitled to an equal proportional share in the assets. Under the National Banking Act a ratable distribution is required under R. S. 5236, Title 12 U. S. C. A. Sec. 194. (See Note 122.) It involves distribution according to one rule of proportion applicable to all alike.

This is not a case of distribution. The creditor voluntarily (as in the case of *Gamble v. Wimberly,* 44 F. (2d) 329) elected to look to this security. However the rule will not be evaded by indirection. The "claim" remains the same, fixed and frozen by the oncoming of insolvency. The "obligation" is not always synonymous with the "claim".

Appellee cites the case of:

Ticonic National Bank v. Sprague, 303 U. S. 362-411, 82 L. Ed. 630 (Mar. 7, 1938). Appellee's Brief pp. 4-11 incl.

as authority under this phase of the question.

It appears from the *Ticonic* case, 303 U. S. 362; certiorari granted "limited to the question of interest" 302 U. S. 657; 90 Fed. (2d) 641 opinion on rehearing; 87 Fed. (2d) 365 first opinion (C. C. A. 9th) 14 F. S. 900 (D. C. May 29, 1936) that in March, 1931, the trust was created by Lottie Sprague in the original Ticonic Bank under provisions of the Federal Reserve Act authorizing the board to permit National Banks to act as fidicuaries:

> "Funds deposited or held in trust by the bank awaiting investment shall be carried in a separate account and shall not be used by the bank in the conduct of its business unless it shall first set aside in the trust department United States bonds or other securities approved by the Board of Governors of the Federal Reserve System.
>
> In the event of the failure of such bank the owners of the funds held in trust for investment shall have a lien on the bonds or other securities so set apart in addition to their claim against the estate of the bank."
>
> Sec. 11(k) Federal Reserve Act, as amended (12 U. S. C. A. Sec. 248(k)).

The bank used the money in its business but set aside $20,000.00 in Denmark 6 per cent bonds to protect this and other trusts aggregating some $10,000.00.

In August, 1931, the original Ticonic bank sold out to the Peoples-Ticonic bank which after succeeding to the assets and obligations, failed in March, 1933. Arthur Picher became receiver of both estates.

Picher sold the Denmark bonds for $20,722.66 and held the money.

In 1935, Lottie Sprague sued the banks and receiver to have it declared that the bonds were held as security for their special deposit amounting to $3649.65. It was treated as a suit to assert the trust and enforce the statutory lien against the money received for the bonds. The trial court ordered the sum paid with interest from July 29, 1935, the date the petition was filed. (14 F. S. 900.)

The Circuit Court of Appeals finally affirmed the trial court's decision (90 Fed. (2d) 641, C. C. A. 9th):

> "It ruled that although the requirement of ratable distribution precludes the recovery of interest against the general funds of an insolvent national bank, the general creditors have no rights in the trust funds here involved until after the secured claims are paid."
>
> Supreme Court opinion, 82 L. Ed. at 631.

This involves an assertion of a national bank rule applied to the facts in the *Ticonic* case, that the obligation was to pay interest, not from date of insolvency, but from date of suit, and not as commercial interest but as damages for delay in according a right. It involves the assertion that such damages were promised by the contract and assured by the statutory lien.

It is apparent why the statute was passed. Generally speaking, special deposits and trust funds are in danger of being lost through commingling, so that they may not be traced and thus will become available to general creditors. The statutory lien assures that they will be earmarked by setting aside, from the bank's general assets, bonds which cannot be reached by general creditors except as to excess.

The Supreme Court opinion points out that:

> "By contract or, as in this case, by statute, the secured creditors gain or are given a lien on or right in property 'in addition to their claim against the estate of the bank'. Section 11(k) of the Federal Reserve Act as amended."
>
> Supreme Court opinion, 82 L. Ed. 633.

It is not pretended and it does not appear that in the *Ticonic* case any "claim" was pursued against the "estate of the bank" in insolvency proceedings. No dividends were demanded. The statutory lien alone was looked to and the court enforced it by holding that it covered damages for delay.

The Supreme Court, speaking of "analogous cases" states that the rule for the payment of interest "up to the date of payment" has been followed in bankruptcy cases, in equity receiverships and "was applied to state banks in *Washington-Alaska Bank v. Dexter-Horton National Bank* (C. C. A. 9th), 263 Fed. 304, 306". (82 L. Ed. 633.)

The *Washington-Alaska* case found that the contract and security contemplated the continued payment of principal and interest and rejected the contention that the Nevada Bank Act of 1909, giving priority to the claims of depositors, had extraterritorial effect and governed the contract. The dissent of Judge Ross makes this clear. It is also analyzed in the *Douglass v. Thurston County* case, supra. In the instant case the Nevada statute of 1911 operates at home. It governs the contract and it bars any lien for or the payment of any interest incurred after insolvency of a state bank.

The debtor in the *Ticonic* case was a National bank and the obligation secured did not bear interest. There was no law, as in Nevada, denying a lien for the payment of interest incurred after insolvency. The Federal law was directly to the contrary and granted a lien after insolvency, in plain terms. A contract of security was not restricted as in Nevada, but was enlarged and is further enlarged and construed by the Supreme Court in the Ticonic decision.

The Ticonic decision was not grounded on any right to compute interest on a secured debt after insolvency, but rather on a construction that the debt by the implied terms of the contract included damages for detention.

In this connection we call attention that the *Ticonic* case says nothing whatever as to the manner of collecting interest or the source, after insolvency, when the creditor looks to his security alone.

It does not appear that the Comptroller has "universally followed" the rule laid down in the *Ticonic* case, as appellee suggests on page 21 of his brief. Rather it appears that the Comptroller and the appellee are committed to the rule laid down in *Gamble v. Wimberly,* 44 F. (2d) 329.

The decision in the *Ticonic* case has been extant since March 7, 1938, yet has not been cited, to the point here urged by appellee, since that time so far as we can ascertain. And the decisions affecting the section of the Federal Reserve Act in question have been confined to the status of trust funds. See:

> *Haughney v. Gifford et al.* (C. C. A. 3d), Feb. 1937, 88 F. (2d) 80,

where the receiver apparently at the instigation of the Comptroller of the Currency held that Sec. 11 (k) Title 12 U. S. C. A. Sec. 248 (k) did not apply.

> *First National Bank of Chattanooga v. Bell* (C. C. A. 6th), June, 1938, 97 F. (2d) 683,

where a trust was upheld against the contention of the receiver and interest on outlays was allowed only to the date of the receivership, citing *Anderson v. Missouri State Life Ins. Co.* (C. C. A. 6th), 69 F. (2d) 794, and *White v. Knox,* 111 U. S. 784.

> *Way v. Camden Safe Deposit & Trust Co.* (D. C. N. J. 1937), 21 F. S. 700,

upholding the receiver against the demands of one asking to be a substitute trustee.

> *Bobbitt v. Oxford Nat. Bank,* 208 N. C. 460 (Sept. 1935), 181 S. E. 251,

where the claim was for a trust fund used by the bank in its business and protected by bonds pursuant to Sec. 11 (k) of the Federal Reserve Act. The appellate court reversed the trial court's holding that the claim was "neither a preferred or a secured claim". No interest was claimed either from the date of the original deposit in 1928 or from the date of the security in 1932. The claim was paid simply as a preferred claim.

Appellee has cited as his authority for the allowance of interest following insolvency the case of *State ex. rel. Hansen v. Chelan County* (Wash.), 54 Pac. (2d) 1006. We assuredly do not consider this case in point. In the first place, there was no statute to bar the lien but, on the contrary, the Washington statute:

(1) required the payment of 2% interest on all moneys deposited;

(2) did not limit or prohibit the county treasurer from contracting for a greater rate than 2% in the event of insolvency; and

(3) authorized the bank to give such security for such deposits as are required by law or by the officer making the same.

The court in that case merely held that, by the express terms of the statute, the county treasurer was authorized to contract for and to collect interest at the rate of 6% after insolvency. This Washington case, however, is matched on the facts, and the decision is to the contrary, in the case of

Re: *American Bank & Trust Co. of Ardmore* (Okla.), 55 Pac. (2d) 470.

Citing *Michie on Banks,* Vol. 3, p. 329, 39 A. L. R. 457 (which is supplemented by 44 A. L. R. 1170).

III. WHETHER THE RULE REQUIRING A RATABLE DISTRIBUTION TO CREDITORS PERMITS A SECURED CREDITOR TO RETAIN ANY INTEREST COLLECTED FROM COLLATERALS OTHER THAN THE INTEREST ACCRUED AND COLLECTED FROM COLLATERALS AFTER INSOLVENCY—APPLYING ALL OTHER COLLECTIONS FROM THE COLLATERALS TO THE REDUCTION OF THE CLAIM, FOR PRINCIPAL ALONE, WITHOUT INTEREST.

This is the last part of appellant's major question of law and it is the first in point of treatment in appellee's brief. It concerns the mode or manner of obtaining interest on a secured obligation in state bank insolvency proceedings, if and when such a "new debt" is permitted under the Nevada law, promised under the Nevada contract of security and admissible against the general rule commanding that the distribution be ratable.

Appellant contends and has contended that the claim became fixed and frozen in the sum of the obligation remaining due on the day of insolvency and that no further charge by way of after-incurring interest could be allowed or paid under any pretext or in any manner whatever.

Appellee contended at the trial, in the pleadings and on the proof, and still contends, that the obligation as it stood on the day of insolvency may be increased by interest until entirely paid according to the manner and mode laid down by the decision in the case of *Gamble v. Wimberly*, 44 F. (2d) 329.

Appellee cites the above case on page 3 of brief and quotes it in part. The quotation is to the effect that under the facts and as an exception to the general rule interest on the obligation after insolvency might be "retained by the trustee".

But the court in the *Gamble* case went further and pointed out that the rule remained unchanged as to increasing the "claim" as the basis of "dividends" but could be avoided in practice if the creditor elected to look to the collaterals and capture interest on the obligation by retaining interest on the collaterals over a like period after insolvency. The court said:

> "Summarizing our conclusions, we find that, whereas the judgment of the lower court was correct in so far as it required the receiver to pay dividends ratably to the trustee based upon the latter's original claim, it was, nevertheless, in error in permitting the trustee to apply collections from collateral to the liquidation of interest, as the trustee did, and thereby to increase the amount, still unpaid, of his original claim by the amount of interest so liquidated. Although not required to do so, the trustee having in fact sold the collateral, and the total of all dividends paid and anticipated being much less than the full amount of his claim, he should apply in further liquidation thereof, not merely the balance of the proceeds realized from the collateral (as he has voluntarily done), but the total amount of such proceeds, less only any interest and dividends that may have accrued upon the collateral itself since the date of the Wilmington bank's insolvency.
>
> "Accordingly, the case must be remanded in order that the judgment may be modified in conformity with this opinion.
>
> "Modified and remanded."
>
> 44 F. (2d) 333-4.

We call attention to a difference in terminology. The original "claim" is the amount presently due on proof in insolvency proceedings. "Dividends" are partial payments from time to time on the aggregate "claims". The "obligation" is the amount undertaken to be paid by the debtor. No dividends are paid on it when the creditor retains and looks to his collaterals rather than to "dividends".

It is certainly a far cry from appellee's present construction of the *Gamble v. Wimberly* case, as stated on page 3 of his brief, and as noted above, to the construction which has been at all times heretofore placed by both appellee and the Comptroller upon the decision in that case. The case is an interesting one, and no part of it is any more interesting or enlightening than the excerpts quoted by appellee on pages 3 and 4 of his brief. The facts in that case stated briefly and chronologically were:

Prior to October, 1929, First National Bank of Rocky Mount, North Carolina, later represented by Wimberly, trustee, loaned Commercial National Bank of Wilmington, North Carolina, $25,000.00 taking collateral security. On October 26, 1929, the trustee, Wimberly, sold the collaterals for $23,331.30. On December 29, 1929, the trustee had the additional sum of $3402.90 on deposit with Commercial National and on that day Commercial National failed and Gamble was made receiver.

Receiver Gamble paid two dividends of 7½% each and Wimberly received $4260.44 on his claim for $28,402.90.

When the time came to pay a third dividend Gamble proposed to debit Wimberly with the collections and the dividends and pay the balance of $811.16 by ratable dividends on the original claim for $28,402.90.

Wimberly protested that the original "claim" was $28,402.90 but that the interest on that was $2372.89, making a total of $30,775.79; that it was reduced by dividends of $4260.44 and total collections from collaterals of $23,331.30 or by a total of $27,591.74, leaving a balance unpaid of $3194.05.

The variance between the parties was the difference between the $3184.05 claimed by Wimberly and the $811.16 conceded by Gamble or $2372.89 the interest in dispute.

The trial court ruled that dividends in all cases should be based on the original claim of $28,402.90 without any increase by way of interest but it held that Wimberly was entitled to future dividends on that sum until he should receive the amount he claimed, to-wit: $3184.05. In other words out of the collections from collaterals amounting to $23,331.30 he required Wimberly to credit on the face of the original claim $20,958.41 only and permitted him to retain the balance $2372.89.

Gamble appealed and the appellate court sustained the trial court in the ruling that the claim did not grow with interest, but found that on the obligation Wimberly was entitled to retain such interest as he collected from the collaterals after insolvency. The court however was not satisfied that the sum in question $2372.89 was the correct sum and therefore remanded the case for determination on that point alone.

It was foreshadowed that this sum would not be allowed to be retained. This appeared by reason of the fact that Wimberly sold the collaterals before the day of insolvency and not after. It was foreshadowed that in the end Wimberly would be required to credit this $2372.89 on the face of the claim. Thus Gamble's contention seemed destined to prevail so that all that would remain due would be $811.16.

The instant case narrows down to a question of fact. If any interest is to be taken into consideration at all in this case, it must be the interest actually collected from the collaterals after insolvency.

Appellee fixed this sum in his pleadings at $14,658.84; Answer Par. III, IV, Tr. p. 24; at another time $5182.92; at another time $23,118.97. See page 39, transcript. In Finding IV the court found this sum to be $2930.75 and in Finding V to be $14,658.84, all these amounts running to October 21, 1936, from February 16, 1932. (Tr. pp. 57-58.)

As heretofore explained, if that rule were applied in the instant case, the appellee would be allowed $2930.75 as the interest actually accrued and collected from the collaterals after insolvency.

Appellee quotes from *Sexton v. Dreyfus,* 219 U. S. 345, 55 L. Ed. 244, on pages 3, 4 of brief. This is in conflict with *Gamble v. Wimberly* on which appellee relies, because *Gamble v. Wimberly* is based on the National banking law.

> "However, we are concerned here, not with the winding up of a private corporation, but with a national bank; and it has long been settled that

the national banking laws, part of which have been above quoted, govern any distribution of the assets of an insolvent national bank, and that its provisions are not to be departed from, anything in the bankruptcy law to the contrary notwithstanding. Cook County National Bank v. United States, 107 U. S. 445, 2 S. Ct. 561, 27 L. Ed. 537."

Opinion 44 F. (2d) P. 331, top of col. 1.

Appellee seems to cite the *Ticonic* case, 303 U. S. 362-411 (Brief p. 4), as bearing on the manner and mode of payment in cases where the creditor looks to his collaterals, but that case is entirely devoid of reference to the manner of payment. There were no dividends; there was no earning power of the collaterals. The money with the penalty was ordered surrendered in a lump sum as a trust fund and even the penalty or damages was computed only from date of petition and not from date of insolvency. While the *Ticonic* case may shed light on the right to make a new debt after insolvency, it sheds no light whatever on the question here in view.

Appellee questions our statement as to the holding in:

U. S. Fidelity & Guaranty Co. v. Malia, Bank Commissioner, 49 P. (2d) 954 (Utah).

It appears quite clear that in that case the court in review sustained the defendant's demurrer and applied the Bankruptcy rule as contended for by the defendant as against the equity rule as contended for by the plaintiff. The assigned "claim" for the deposit and the claim for the uncollected balance did not include any claim for after-accruing interest. The court cited the Utah statute against preferences as follows:

> "R. S. Utah 1933, c. 2, tit. 7, provides for the suspension and liquidation of banking institutions. Section 7-2-15 provides that 'no preferences or priorities shall be given to any claim,' except those incurred in liquidating the affairs and those otherwise provided by law. This section enumerates certain claims which are to be given preference and provides that such claims shall be paid in full before 'any payment shall be made upon the claims of depositors and other general creditors of such bank.' "

See opinion 49 P. (2d) at 956, col. 2.

Appellant pointed this out in brief pp. 36-37.

The decision states the bankruptcy rule with respect to the "claim" not the claim augmented by interest, in the light of the state statute proscribing preferences.

It might be well at this point to sum up the situation as it is now presented, based upon the pleadings, the undisputed evidence and the briefs heretofore filed.

This action was instituted by the mortgage corporation upon the "straight-up" theory that under the terms of the Nevada statute (particularly Secs. 3J and 53 of the 1911 Banking Act) and of the collateral agreements (Exhibits B, C and D attached to the plaintiff's complaint, Transcript pp. 16-21) the mortgage corporation was entitled to all collections made by the receiver in excess of the amount due on the $60,500.00 note on February 16, 1932, when the Lyon

County Bank failed, and also to the return of the remaining securities.

The receiver in his answer admitted the amount of the collections to have been as alleged by the mortgage corporation, but denied as a conclusion that the indebtedness had been fully paid, and alleged, by way of justification for the retention of the excess (Transcript, p. 24), that the receiver had collected as interest on the pledged assets the sum of $14,658.84, which he had applied as interest on the main obligation, and that there was still a balance owing on the main obligation of $9316.94 as of October 21, 1936.

At the trial the receiver called but one witness (his bookkeeper, Mr. Butler), and the only testimony sought to be elicited from him was as to the amount of interest collected on the pledged assets and, incidentally, the application of interest payments and the amount due on the main obligation, all based on the so-called revision.

In addition to this, counsel for the receiver introduced in evidence (Defendant's Exhibit A, Transcript p. 94) a letter from one Kit Williams, Executive Assistant Counsel Comptroller of the Currency, addressed to the receiver under date of December 16, 1936, outlining the application which should have been made of the moneys received by the receiver and stating that "you should have applied toward the interest due on your bills payable obligation the income accrued upon and collected from the pledged assets after the date of closing of the Lyon County Bank", etc., and citing the rule to be followed as stated in the case of *Gamble v. Wimberly,* 44 F. (2d) 329.

In the receiver's brief submitted to the trial court he stated that it "may be readily conceded" "that we are governed in this case by the laws of the State of Nevada".

In the decision of the court (Transcript pp. 41-48) the judge recognized the major issue presented when he said:

> "Questions of law presented upon the facts of this case are whether the amount of indebtedness of the Lyon County Bank to the Reno National Bank is finally determined as of the date of insolvency of the Lyon County Bank and its taking over by the State Bank Examiner and thereafter no interest would accrue thereon, which is the contention of complainant, or whether, where such indebtedness is secured by interest bearing pledges, interest derived therefrom may be applied in discharge of interest which does accrue thereon, which is the contention of defendant."

The court reached the conclusion that the receiver was entitled to retain interest earned and collected upon the pledged assets subsequent to the date of insolvency of the Lyon County Bank but made conflicting findings as to the amount of such interest.

In paragraph IV he found the amount of such interest earned and collected to have been $2930.75, which is the correct amount as shown by the evidence. In paragraph V he found the amount to have been $14,658.84, which has no basis in the evidence, as the sum testified to by the receiver's witness, Mr.

Butler, was $23,118.97 (Transcript p. 112), and he explains that (Transcript p. 113) he had "never made a compilation, split as to the date February 16, 1932 (date of suspension of Lyon County Bank) as to the interest actually accruing on this underlying security after the Lyon County Bank closed February 16, 1932,—or as to interest which accrued after that date and was collected after that date by Mr. Tobin". Mr. Butler mentioned the sum of $14,658.84 but stated that it was not correct except under the "revised set up", and even then this figure had reference only to the accumulated interest on the main obligation and had no connection whatever with the interest collected on the pledged assets. This figure of $14,658.84 was apparently taken by the court (Transcript p. 42) from what he says the defendant by its answer "admits" having collected.

There is no evidence whatever as to the amount of interest earned upon the pledged assets subsequent to February 16, 1932, and collected by the receiver, except the testimony of the receiver himself as a witness for the mortgage corporation (Transcript pp. 76-91), which shows conclusively that the sum of $2930.75 specified in the court's finding number IV was correct. In his brief submitted to this court the receiver's counsel does not even question the correctness of this finding.

In the original findings prepared by receiver's counsel (Transcript pp. 49-52) the only authority which counsel claimed or the court (by signing the findings) recognized for the retention of any part of the moneys collected by the receiver in excess of the face of the claim as it existed on February 16, 1932, was by virtue of the fact that "the sum of $14, 658.84 had been collected as interest on said collateral securities accruing after the date of insolvency of said Lyon County Bank".

In the court's findings of September 8, 1938 (Transcript pp. 55-60) the trial court further emphasized the same principle as his ground for deciding in the receiver's favor.

From the foregoing it will be observed that every move made in this case from the time of its inception, whether it be by way of pleading, evidence, argument or decision, has been with the one principal motive of determining whether, on the one hand, under the pledging agreements and the Nevada statute, the receiver is barred from claiming any interest, or, whether, on the other hand, he may have the benefit of the interest accrued and collected by him on the pledged assets following the closing of the Lyon County Bank.

Now, however, receiver's counsel seems to have abandoned everything that has gone before and to have taken the position evidenced by two sweeping statements appearing, respectively, on pages 3 and 11 of his brief, as follows:

> "Under the authority immediately cited, we need not depend on the avails or interest or dividends collected on the pledged securities for the payment of the interest and principal until both have been paid in full, but we may apply any payments of whatsoever kind or character to the payment of principal and interest."

"There is no chance to misunderstand the law under the manifestation of the last decision of the Supreme Court of the United States on this question. We are entitled to payment of principal and interest in full from the proceeds of the collateral, be it principal or interest or dividends."

He does not in any way attempt to justify the so-called revisions made by the receiver after the mortgage corporation had demanded an account, nor does he seem any longer interested in the question of what interest was earned and collected upon the pledged assets following the insolvency of the Lyon County Bank, but passes these things off with the following casual observation appearing on page 26 of his brief:

"If appellee is entitled to payment of interest accruing after insolvency of the Lyon County Bank, then there would be no point in arguing as to what amounts of interest arose from the collection of interest on the securities or the application of payments."

Counsel, however, does devote several pages of his brief to an analysis of certain cases cited on pages 32-39 of our opening brief, calling repeated attention to the fact that "no question of interest after insolvency was involved", etc. The court will observe, as counsel failed to do, that these cases were all cited in support of the proposition that "the Nevada Act of 1911 is inclusive of the whole banking subject and exclusive of all other law, state or federal". If any of the cases cited (and analyzed by counsel) had involved the question of interest on a secured claim after insolvency of the debtor, it would have been purely a coincidence.

We pointed out in our opening brief that "the Nevada Act of 1911 is inclusive of the whole banking subject and exclusive of all other law, state or federal", so far as this case is concerned, and we also pointed out that "the Nevada law is founded on the police power" and that "contracts are made in the light of existing law and police power and the law becomes part of the contracts". Neither of these propositions is questioned by counsel and we assume that they may be conceded.

In conclusion we summarize:

1. The Nevada law denies any lien for any liability or payment incurred after insolvency known to the creditor.

2. The Nevada law is written into any contract of security for the payment of interest incurred after insolvency.

If the pledge was given for pre-existing principal and interest, it is void.

If it was given to cover interest after insolvency it is barred by law.

If appellee is correct in his contention that future interest is not an indebtedness or liability "thereafter incurred", then regardless of the statute the contracts here expressly bar the claim for any interest, as certainly future interest which might or might not accrue was not a part of the "present indebtedness" on July 22, 1931.

3. Interest is not secured, because the security contract is not in conformity with any valid agree-

ment to secure interest. To that extent it is unsecured and must yield to the rule requiring a ratable distribution.

4. A "claim" in insolvency proceedings, made as the basis for dividends, is fixed when filed on insolvency and is not to be enlarged by interest computed after insolvency. If interest is to be captured when the creditor looks to his collaterals it must be taken, not by enlarging the claim, but by retaining an appropriate amount from the interest on the collaterals retained, confined solely to the interest after insolvency. All other collections must be credited upon the face of the obligation.

Appellant denies interest in any event because it is not secured pursuant to the Nevada law.

Appellee claims the interest as "secured" because it was "nominated in the bond" and rejects the Nevada law.

Appellee claims that the manner and mode of capturing the interest on the obligation after insolvency, to the disregard of "dividends" on his "claim", is by retaining the interest collected after insolvency on the collaterals retained by him. Appellee's theory in the pleadings, at the trial, under the Comptroller's directions, and in the briefs has been that he is bound to credit all collections against the face of his claim or obligation, whether they be principal or interest collections, less only such collections of interest on the collaterals as were earned after insolvency. This is the theory of *Gamble v. Wimberly* upon which appellee has relied from the beginning. This is the sole question of fact tried.

Aside from the law, on which appellant still stands, appellant points out that appellee does not dispute the facts stated in appellant's brief. Appellee has not established that the collections of interest on the collaterals after insolvency and up to October 21, 1936, exceeded \$2930.75 as set forth in the trial court's finding IV at page 58 of the transcript. Appellee has not impaired the statement of facts contained in proposed finding VI filed by complainant-appellant the 11th day of August, 1938, appearing at page 136 of the transcript in the bill of exceptions. Appellee has not justified in any manner the court's finding V at page 58 of the transcript fixing the amount purported to have been collected as interest on the collaterals after insolvency at \$14,658.84. Appellee has not explained the use of the words "present indebtedness" in the contract.

Appellee does not discuss the evidence. He concedes the facts as we claim them. He asks that *Gamble v. Wimberly* be applied. This alone is tantamount to confessing error and for that error and other errors assigned we ask that the judgment be reversed and corrected and that speedy justice be done to the appellant aggrieved herein.

Dated, Carson City, Nevada,
March 20, 1939.

Respectfully submitted,
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